IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-71

JOHN M. DINEEN and JOHN HENSLEY, on behalf of themselves and FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, and all other similarly situated; FRATERNAL ORDER OF POLICE OF ILLINOIS, a not-for-profit organization, on behalf of itself and all others similarly situated,

Petitioners,

vs.

RICHARD J. DALEY, Mayor of the City of Chicago, and CITY COUNCIL OF CHICAGO, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, JOHN M. DINEEN and JOHN HENSLEY, on behalf of themselves and FRATERNAL ORDER OF POLICE, CHICAGO LODGE NO. 7, and all others similarly situated; FRATERNAL ORDER OF POLICE OF ILLINOIS, a not-for-profit organization, on behalf of itself and all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the judgment entered on April 15, 1977, by the United States Court of Appeals for the Seventh Circuit in its cause No. 76-1587.

OPINIONS BELOW

On April 19, 1976, the Honorable Bernard M. Decker of the United States District Court for the Northern District of Illinois, Eastern Division, denied the petitioners' motion for convening a panel of three judges to determine the invalidity of the City of Chicago ordinance creating an Executive Department of Personnel as a violation of the petitioners' constitutional guarantees of freedom of speech, due process, and equal protection as presently afforded them under the Civil Service Act of the State of Illinois and dismissed the petitioners' amended complaint on the legal theory that no controversy was before the Court which was ripe for determination. (Memorandum opinion of the Honorable Bernard M. Decker is reprinted herein as Appendix A).

On April 15, 1977, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, affirmed Judge Decker's ruling which Court of Appeals unpublished order is reprinted at Appendix B.

JURISDICTION

1. The federal questions were raised by the petitioners' complaint and amended complaint to the effect that the newly created Executive Department of Personnel of the City of Chicago replacing the Civil Service Act of the State of Illinois violated the petitioners' constitutional rights relating to the I, V, IX and XIV Amendments of the United States Constitution, U. S. Code, Title 28, Chapter 151 Secs. 2201 and 2202 (declaratory judgments), U. S. Code, Title 28, Chap. 155 Secs. 2281 and 2284 (convening a panel of three judges for issuance of injunction), and U. S. Code, Title 42, Chapt. 21 Sec. 1983 (violation of civil rights).

2. The petition for certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on April 15, 1977.

QUESTIONS PRESENTED

1. Did the new Chicago ordinance effective January 1, 1976, creating an Executive Department of Personnel as a substitute for the Civil Service Act of the State of Illinois impair vested proprietary rights for which a panel of three judges should have been convened?

2. Did the new Chicago ordinance effective January 1, 1976, creating an Executive Department of Personnel as a substitute for the Civil Service Act of the State of Illinois impair vested proprietary rights resulting in a controversy ripe for determination?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On December 2, 1975, the petitioners filed a complaint for declaratory judgment and injunctive relief challenging the newly created Executive Department of Personnel by the respondents as a substitute for the Civil Service Act of the State of Illinois relating to Chicago Police Officers.

On December 19, 1975, the respondents filed a notice and motion to dismiss the complaint of the petitioners for failure to state a claim upon which relief could be granted, and a brief in support of respondents' motion.

In answer to the respondents' motion to dismiss and supporting brief relating thereto, the petitioners filed a notice and brief in opposition to respondents' motion to dismiss the petitioners' complaint.

On December 30, 1975, the petitioners motioned the matter for hearing before the Honorable Bernard M. Decker for a hearing on petitioners' complaint for a convening of a panel of three judges, injunctive and other relief, and on respondents' motion to dismiss petitioners' complaint.

The Honorable Bernard M. Decker denied the petitioners' motion for temporary restraining order restraining the respondents from promulgating and enforcing the newly created ordinance of the Executive Department of Personnel and granted leave for petitioners to file an amended complaint with supplemental brief in 21 days from December 31, 1975.

Pursuant to the order entered by the Honorable Bernard M. Decker on December 31, 1975, the petitioners filed a notice, amended complaint and supplemental brief on January 20, 1976.

On February 4, 1976, the respondents filed a notice, motion to dismiss petitioners' amended complaint and brief in support of such motion.

On April 16, 1976, the Honorable Bernard M. Decker filed a memorandum opinion denying petitioners' motion for a panel of three judges on the legal theory that a local ordinance was involved and not a state statute which would invoke the application of U. S. Code, Title 28, Chap. 155, Sec. 2281 requiring the convening of a panel of three judges when a state statute is challenged.

Further, in the aforesaid memorandum opinion of April 16, 1976, the Honorable Bernard M. Decker ruled that the petitioners' challenge of the respondents' newly created ordinance in terms of the I, V, IX and XIV Amendments of the United States Constitution could not be entertained in that there was no controversy which was ripe for determination.

Reflecting the rulings of the Honorable Bernard M. Decker as expressed in his memorandum opinion of April 16, 1976, an order to this effect was entered on April 19, 1976.

From the order of the Honorable Bernard M. Decker entered on April 19, 1976, the petitioners filed a notice of appeal on May 12, 1976.

On April 15, 1977, the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, entered a judgment in terms of an unpublished order affirming the Honorable Bernard M. Decker's ruling as expressed in his memorandum opinion of April 16, 1976.

REASONS FOR GRANTING THE WRIT

I.

When the petitioners had filed their complaint and amended complaint in this instance, both complaints had prayed for the convening of a panel of three judges based on the allegations as contained in those complaints.

Analyzing the complaint and amended complaint relating to their prayer for the convening of a panel of three judges, it is the contention of the petitioners that *Sands v. Wainwright*, 491 F. 2d 417 (1973) and specifically pg. 423 of that opinion applies on the basis of the following language:

> "In *Phillips v. United States*, *supra*, the Supreme Court said that to trigger the three-judge court procedure "requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board of commission.'" 312 U.S. at 251, 61 S.Ct. at 483, 85 L. Ed. at 805. Later, the Court added: "In our view the word 'statute' in (the three-judge court provision) is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction."

As the respondents acknowledge that their newly created ordinance of Executive Department of Personnel was passed in conjunction with the 1970 Illinois Constitution under home rule powers, the City of Chicago ordinance in question reflects a state wide policy via home rule power to replace the Civil Service Act not only in the City of Chicago but throughout the State of Illinois.

As a consequence, the City of Chicago ordinance creating an Executive Department of Personnel has state wide ramifications for which a panel of three judges can be involved as is stated as follows on page 496 from *Krzewinski v. Kugler*, 338 F. Supp. 492 (1972):

> "While a municipal ordinance standing alone is not a "statute" within the meaning of 28 U.S.C. 2281, Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967); Sailors v. Board of Education, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 (1967); Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990 (1928), if ordinances are in fact a state-wide application of law embodied in or authorized by a state statute, ths rquirement of 28 U.S.C. 2281 is satisfied. City of Cleveland v. United States, 323 U.S. 329, 65 S.Ct. 280, 89 L.Ed. 274 (1945). Clearly, in N.J.S.A. 40:47-5 and the many ordinances enacted thereunder comprise a "compendious summary of various enactments" by which the State of New Jersey has given its sanction to the residency requirement. A. F. of L. v. Watson, 327 U.S. 582, 592, 66 S.Ct. 761, 90 L. Ed. 873 (1946). Whether the statute and local ordinances enacted thereunder in fact represent the implementation of a truly state-wide policy or scheme is a determination which a federal court must make by examining the practical aspects of the operation of such laws. Simon v. Landry, 359 F.2d 67 (5th Cir. 1966), cert. denied, 385 U. S. 838, 87 S.Ct. 86, 17 L. Ed. 2d 72 (1966), cert. denied, 385 U. S. 838, 87 S. Ct. 86, 17 L. Ed. 2d 72 (1966); Hyden v. Baker, 286 F. Supp. 475 (M.D. Tenn. 1968); Israel v. City Rent and Rehabilitation Administration, 285 F. Supp. 908 (S.D.N.Y. 1968). Although the residency rule is not necessarily applicable in every New Jersey municipality, this Court is satisfied that its operation and enforcement is sufficiently state-wide to justify its classification as a "statute" within the meaning of 28 U.S.C. 2281, thereby vesting jurisdiction to decide this case in a three-judge court."

Therefore, the Illinois Constitution of 1970 providing for home rule power has enabled the City of Chicago to create an ordinance embodying state policy for the replacement of the Civil Service Act resulting in state wide ramifications affecting police officers not only in the City of Chicago but throughout the State of Illinois for which a panel of three judges can be invoked. *U. S. Code*, Title 28, Chap. 155, Sec. 2281.

II.

The decision below violates the individual rights of the petitioners on the basis of the I, V, IX and XIV Amendments of the United States Constitution in that the newly created ordinance of the City of Chicago establishing an Executive Department of Personnel as a substitute for the Civil Service Act of the State of Illinois has impaired the vested rights of petitioners to hirings, promotions, and discharges based upon an orderly merit system as promulgated by the Civil Service Act of the State of Illinois. (Reproduced herein as Appendix C)

That the Civil Service Act of the State of Illinois does in fact govern the hirings, promotions and discharges of policemen is substantiated by a recent United States Court of Appeals for the Seventh Circuit decision entitled the *United States v. City of Chicago*, 549 F. 2d 415 (1977) and specifically on pages 437 and 439 which are cited as follows:

> Pg. 437:
>
> "As we have previously noted, the hiring procedure of the Chicago Police Deprtment is governed by the Illinois Municipal Code. That statute unequivocally states that only persons who pass a qualifying examination may be placed on the eligibility roster for a position covered by the Code and that hiring for that position must be from the eligibility roster, in rank order. Ill.Rev.Stat. ch. 24

§§ 10-1-12, 10-1-14. Of course, insofar as these provisions, as applied, violate the command of Title VII, their operation must be suspended under the supremacy clause. Moreover, the City has an affirmative obligation to develop new tests, within the constraints of state law, that do not produce illegally discriminatory results. But the fact that the general testing procedure set up by the Illinois legislature, as put into practice by the City, produced results which conflicted with federal civil rights legislation did not give the district court an unbridled license to replace the state's method for selecting police officers with its own. "When a state statute is assailed because of alleged conflict with a federal law, the same considerations for forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare a statute unconstitutional outright." *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 546, 79 S.Ct. 1302, 1314, 3 L.Ed.2d 1407 (1959) (Frankfurter, J. dissenting). Accordingly, the district court should have constructed its remedy to preserve as much of the Illinois statutory scheme as possible."

Pg. 439:

"Promotions within the Police Department, like appointments, are strictly governed by the Illinois Municipal Code. The Illinois legislature has limited promotions to any position covered by the Municipal Code to the top three candidates on the relevant eligibility roster. Ill.Rev.Stat. ch. 24, § 10-1-13. While the district court was required under Title VII to suspend this statutory scheme to remedy illegal discrimination, it should not have authorized actions contrary to the Municipal Code which were not necessary to achieve this goal. The temporary appointments to sergeant were made completely at the discretion of the Police Department. The Code appears to have been designed exactly to prevent this exigency. Therefore, we hold that those appointments cannot be made permanent. Promotions to sergeant after the forty percent quota has been filled must be made from a roster derived pursuant to state law."

In support of the *U. S. v. City of Chicago* case relating to the recognition that vested proprietary rights do exist via the Civil Service Act of the State of Illinois, *Bishop v. Wood* 44 L.W. 4820 (1976) strengthens that legal recognition as follows:

> "This is not the construction which six Members of this Court placed on the federal regulations involved in *Arnett v. Kennedy*, 416 U.S. 134. In that case the Court concluded that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection. In this case, a holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest."

As expressed in the *Bishop* case, since the State of Illinois has a Civil Service Act, Illinois policemen have vested proprietary rights in terms of the legal mechanics for hirings, promotions and discharges which vested proprietary rights cannot be obviated by the newly created ordinance of the City of Chicago establishing an Executive Department of Personnel.

Recently the United States Supreme Court in *U. S. Trust Company of New York v. New Jersey* 45 L.W. 4418 (April 27, 1977) held that contractural vested rights as created by a state may be lawfully impaired under certain circumstances under the reserve power doctrine provided that the impairment is reasonable and necessary and serves a compelling or substantial state purpose which could not have been foreseen at the time of the creation of the right.

Granted that the *U. S. Trust Company of New York v. New Jersey* decision relates to a contractural vested right matter, nevertheless, the decision has application to public employees such as the petitioners on the basis of *United States v. City of Chicago* and *Bishop v. Wood* cases as evidenced by the language from *Saunders v. Cahill* 359 F. Supp. 79 (1973) and specifically page 83:

> "It is well settled that an individual, in assuming public employment, retains all the rights and protections otherwise afforded him by the United States Constitution. Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969). One of these constitutionally protected rights is that of freedom from arbitrary and unreasonable conduct on the part of the government."

Consequently, when the Municipal Code of Illinois (Civil Service Act) was created, it established vested proprietary rights as evidenced by the cases of *United States v. City of Chicago* and *Bishop v. Wood* which vested proprietary rights cannot be impaired by the newly created ordinance of the City of Chicago on the same legal theory as expressed in *U. S. Trust Company of New York v. New Jersey* in that the vested proprietary rights of Chicago policemen have the same force and effect as a contractural right which should not be impaired by police power unless it is reasonable and necessary and serves a compelling or substantial city purpose which could not have been foreseen at the time the Civil Service Act of the State of Illinois was created.

Examining pertinent sections of the City of Chicago ordinance creating an Executive Department of personnel as reflected in the petitioners' amended complaint, the concept of political patronage can be

evidenced in the hiring, promoting and discharging of police personnel on the basis of the following cited sections of that ordinance: (Reproduced herein, Appendix D).

Sec. 25.1-5 (1) and Sec. 25.1-9 provide that police officers can be reclassified and reallocated from their current rank;
Sec. 25.1-5 (3) provides that police officers shall be hired on the basis of relative fitness not necessarily on the basis of competitive examinations;
Sec. 25.1-5 (4) provides that the director may substitute other ratings for numerical ratings for promotional examination results and that such examinations need not be city-wide but can be restricted to the area and location and that such examination list shall have no minimum or maximum duration period for expiration;
Sec. 25.1-5 (5) provides that the promotions may be based from the highest ranking group rather than numerical ratings;
Sec. 25.1-5 (6) provides that promotions shall be based upon considerations of the applicant's qualifications, record of performance and ability which rule is meaningless if numerical ratings can be substituted by other rankings;
Sec. 25.1-5 (10) provides for reemployment of employees by virtue of law offs created by lack of funds, abolition of position or material change in duties or organization which rule could be utilized as a tool against competent policemen;
Sec. 25.1-5 (11) provides for a plan of employee grievances and complaints which could be utilized against policemen with just grievances and complaints;
Sec. 25.1-5 (12) Sec. 25.1-5 (14), Sec. 25.1-12 and Sec. 25.1-13 provide that although this ordinance does not apply to *Smith-Hurd Annot. Stat.*, Chap. 24, Sec. 10-1-18.1 (police removal or suspensions—notice—hearings—determinations), nevertheless the combination of the cited sections includes sufficient

language to the effect that the ordinance can be amended to provide that the Personnel Director with his Board can conduct hearings of suspensions and discharges affecting the present standard of fair hearings and removal based only upon cause pursuant to *Smith-Hurd Annot. Stat.*, Chap. 24, Sec. 10-1-18.1 of the Civil Service Act.

Reviewing the memorandum opinion of the Honorable Bernard M. Decker and the unpublished order of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, both rulings readily admit that the guidelines of the ordinance are so general that it is difficult to determine what rules shall be put into effect.

Based upon the position of both rulings, the petitioners are jeopardized by the newly created ordinance establishing an Executive Department of Personnel as a substitute for the Civil Service Act of the State of Illinois which presently affords them the constitutional guarantees of the I, V, IX and XIV Amendments of the United States Constitution as supported by *United States v. City of Chicago* 549 F.2d 415 (1977), *Bishop v. Wood* 44 L.W. 4820 (1976) and *Saunders v. Cahill* 359 F. Supp. 79 (1973).

CONCLUSION

The writ should issue to the United States Court of Appeals for the Seventh Circuit in that the United States Court of Appeals should have granted the petitioners' motion for convening a panel of three judges to determine the invalidity of the City of Chicago ordinance creating an Executive Department of Personnel as a substitute for the Civil Service Act of the State of Illinois and should not have dismissed the petitioners' amended complaint on the legal theory that no controversy was before the Court that was ripe for adjudication.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 4081
JOHN H. DINEEN, et al.,

Plaintiffs,

v.

RICHARD J. DALEY, Mayor of the City of Chicago, et al.,

Defendants.

MEMORANDUM OPINION

This is a civil rights action brought by two Chicago policemen and a local lodge of the Fraternal Order of Police against Richard J. Daley, Mayor of the City of Chicago, and the Chicago City Council. Plaintiffs assert that Chapter 25.1 of the Municipal Code of Chicago, which establishes a Department of Personnel to replace the Civil Service Commission and requires the Department to develope and promulgate personnel rules in conformity with certain guidelines set forth in the ordinance, unconstitutionally infringes their first, fifth, ninth and fourteenth amendment rights. They seek the convening of a three-judge court pursuant to 28 U.S.C. § 2281, a declaration of the unconstitutionality of the ordinance and an injunction against its enforcement.

Defendants deny that a three-judge court is required to hear this case and have moved to dismiss this action for failure to state a claim.

It is clear that a three-judge court is not required. Section 2281 pertains only to challenges to "state statutes of general and statewide application", *Moody v. Flowers*, 387 U.S. 97 (1967); *Dusch v. Davis*, 387 U.S. 112 (1967). Chapter 25.1 is obviously not such a statute. It is a local ordinance of purely local effect. "The term 'statute' in § 2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (*Ex parte Collins* [277 U.S. 565]; *Rorick v. Board of Commissioners*, [307 U.S. 208]) unless he is functioning pursuant to a statewide policy and performing a state function." *Moody v. Flowers, supra*, at 101-102. There is no indication in this case that either of the defendants is acting pursuant to a statewide policy. In fact, a large part of the complaint consists of allegations that their actions are contrary to state policy.

Turning to the merits of the complaint, defendants have argued a number of grounds in support of their motion to dismiss. The one most obviously correct is that this case is simply not ripe for adjudication. The portion of the ordinance upon which plaintiffs base their claim of unconstitutionality is § 25.1-5 which provides that "The Director of Personnel shall issue personnel rules with the approval of the Personnel Board" and, in subsections (1) through (14), sets forth guidelines to be applied to the rules. It is these guidelines which plaintiffs claim deprive them of their constitutional rights. However, these guidelines are, in themselves, of no effect. They can have no impact on plaintiffs until they result in rules which are promulgated by the Board and

enforced by the municipal authorities. To date, no such rules have been promulgated. Moreover, the guidelines are so general that it is impossible to tell what form the rules will take when they are put into effect. It may be that the rules will satisfy all of the objections which plaintiffs assert in their complaint. For example, plaintiffs complain that § 25.1-5(3), which mandates that the rules provide "[f]or the recruitment and selection of persons in the city career service on the basis of their relative fitness", may lead to a rule which deprives them of an interest which they claim to have in the selection of public employees on the basis of competitive examinations. Whatever other difficulties there may be with this claim, it is obvious that the Personnel Board may very well decide that the best way to determine relative fitness is to give competitive examinations.

In this circumstance, there is no controversy before this court which is ripe for determination. The court is being asked to render an advisory opinion about a personnel code which, for practical purposes, does not yet exist. This it will not do. This case falls squarely within the rationale for the ripeness doctrine as articulated by the Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967):

> "[I]t is fair to say that its basic rationale is to prevent the courts, though avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Because the issues in this case are not ripe for adjudication, defendants' motion to dismiss must be granted. *Poe v. Ullman*, 367 U.S. 497 (1961); *Lever Bros Co. v. F.T.C.*, 325 F.Supp. 371 (D.Me. 1971).

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: April 16, 1976

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 76-1587

JOHN M. DINEEN, et al.,

Plaintiffs-Appellants,

v.

RICHARD J. DALEY, Mayor of the City of Chicago, and CITY COUNCIL OF CHICAGO, ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-C-4081—Hon. **Bernard M. Decker**, *Judge.*

SUBMITTED APRIL 1, 1977—DECIDED APRIL 15, 1977
(UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35)

Before PELL, SPRECHER, and TONE, *Circuit Judges.*

This matter comes before the court on the filing of briefs by the parties and on the motion of the appellee for affirmance without oral argument pursuant to Circuit Rule 15. On consideration whereof, we GRANT the motion and AFFIRM the order of the district court.

Plaintiffs-appellants, all police officers presently employed by the City of Chicago, filed a complaint pursuant to 42 U.S.C. § 1983 in which they challenged the

constitutionality of the Personnel Ordinance of the City of Chicago. *See* Chicago, Ill., *Municipal Code* ch. 25.1 (1976). Specifically, plaintiffs allege that their property rights in public employment would be adversely affected if the new personnel ordinance were allowed to be substituted for the Civil Service Act of the State of Illinois, which heretofore had governed them. *Ill. Rev. Stat.* ch. 24, §§ 10-1-1. *et seq.* (1975). In the district court plaintiffs requested the convening of a three judge panel in accordance with 28 U.S.C. § 2281, a declaration of the unconstitutionality of the ordinance and an injunction against its enforcement. The district court denied the request for the three judge panel and dismissed the action as not being ripe for adjudication.

On appeal plaintiffs allege that the district court erred in not granting plaintiffs' motion for a panel of three judges. The three judge court procedure is triggered when a party

> "seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'" *Phillips v. United States*, 312 U.S. 246, 251 (1941).

Municipal or county ordinances, on the other hand, have not been held to be within its purview because they are of a purely local nature. *Younger v. Harris*, 401 U.S. 37 (1971).

A reading of the stated purpose of the ordinance involved in this appeal makes it quite clear that it will have an impact only on the employees of the City of Chicago. As stated in its preamble, the purpose of the personnel code is as follows:

> "to establish a system of personnel administration that meets the social, economic, and program needs

> of the people of the City of Chicago, to provide for a professional and progressive merit system for employment and to insure flexible career service within the City of Chicago. . ." Chicago, Ill. *Municipal Code* ch. 25.1-1 (1976).

Plaintiffs, however, suggest that since the ordinance was passed pursuant to the 1970 Illinois Constitution conferring home rule powers on Chicago, it embodies a statewide policy, via the home rule power grant, to replace the state Civil Service Act. This suggestion strains the imagination.

The concept of home rule adopted by the people of Illinois in Article VII, section 6 of the 1970 Constitution was designed to alter drastically the relationship between the state and its counties and municipalities.[1] Under the new provision local governments were to possess most governmental powers unless specifically denied them by statute. *See e.g., Ill. Const.* art. VII, §§ 6(g), (h), (i), (j) (1970). The grant of powers was broad:

> "[home rule units can exercise] any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." *Id.* § 6(a).

Because the City of Chicago has changed its personnel department pursuant to its home rule powers, other home rule units may be inclined to copy it or they may adopt personnel ordinances dissimilar to the one involved in this case. They will not, however, be bound either to Chicago's personnel policy or its code. Plaintiffs suggest, however, that this ordinance is similar to the one which was considered in *Krezewinski v. Kugler*, 338 F. Supp. 492 (D.N.J., 1972). We do not agree. In

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[1] Baum, A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 *U. Ill. L. Forum* 137.

Krezewinski a three judge panel was convened because the ordinance under review was part of a "compedious summary of various enactments [consisting of numerous state statutes and local ordinances] by which the State of New Jersey has given its sanction to the residency requirement." *Id.* at 496. In this appeal, the personnel ordinance is the unique result of the creative efforts of the Chicago City Council, unguided by any state policy.

Plaintiffs' complaint does not challenge a state statute or an ordinance of statewide application and, therefore, there is no jurisdictional basis on which to convene a three judge court.

The substance of plaintiffs' other argument on appeal appears to be that the Illinois Civil Service Act gives plaintiffs certain constitutional rights in hiring, promotions and in suspension and dismissal hearings. *Ill. Rev. Stat.* ch. 24, §§ 10.1-1 *et seq.* (1975). Plaintiffs contend that rules which may be promulgated by the Department of Personnel may deprive them of these rights.

As the district court recognized, the personnel code which plaintiffs challenge has not now and may never impair the rights which plaintiffs claim. The fourteen guidelines which are to be applied to the rules are very general in nature. *See* § 25.1-5(1)-(14). It is simply impossible to determine in advance what impact they will have on the rules ultimately established for the city career service. Plaintiffs' claims of future injury is clearly speculative and as such insufficient to present an actual case or controversy. *United Public Workers v. Mitchell*, 330 U.S. 75, 90 (1946).

IT IS ORDERED that appellees' motion to affirm without oral argument be GRANTED and the district court judgment AFFIRMED.

APPENDIX C

SMITH-HURD ILLINOIS ANNOTATED STATUTES, CHAP. 24.

§ 10-1-7. Examination of applicants—Military preference—Examiners

All applicants for offices or places in the classified service, except those mentioned in Section 10-1-17 are subject to examination, which shall be public, competitive, and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. No person with a record of misdemeanor convictions except those under Sections 11-5, 11-6, 11-7, 11-9, 11-14, 11-15, 11-17, 11-18, 11-19, 12-2, 12-6, 14-4, 16-1, 21.1-3, 24-3.1, 24-5, 25-1, 28-3, 31-1, 31-4, 31-6, 31-7, 32-1, 32-2, 32-3, 32-4, 32-8, and subsections 1, 6 and 8 of Section 24-1 of the Criminal Code of 1961 or arrested for any cause but not convicted thereon shall be disqualified from taking such examination on grounds of habits or moral character, unless the person is attempting to qualify for a position on the police department, in which case the conviction or arrest may be considered as a factor in determining the person's habits or moral character. Persons entitled to military preference in accordance with the provisions of Section 10-1-16 shall not be subject to limitations specifying age unless they are applicants for a position as a fireman or a policeman having no previous employment status as a fireman or policeman in the regularly constituted fire or police department of such municipality, in which case they must not have attained their 35th birthday. All employees of a municipality of less than 500,000 population except those who would be excluded from the classified service as provided in this Division 1, who are holding such employment as of the date is the later and who have held such employment for at least 2 years immediately prior to that later date, and all firemen and policement regardless of length of service who were either appointed to their respective

positions by the board of fire and police commissioners under the provisions of Division 2 of this Article, or who are serving in a position, except as a temporary employee, in the fire or police department in such municipality on the date a municipality adopts this Division 1, or as of July 17, 1959, whichever date is later, shall become members of the classified civil service of such municipality, without examination.

Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill. However, whenever an applicant shall be unable to pass the physical examination solely as the result of an injury heretofore or hereafter received by the applicant as the result of the performance of an act of duty while working as a temporary employee in the position for which he is being examined, such physical examination shall be waived and the applicant shall be considered to have passed such examination. No questions in any examination shall relate to political or religious opinions or affiliations. Results of examinations and the eligible registers prepared therefrom shall be published by the commission within 60 days after any examinations are held. The commission shall control all examinations, and may, whenever an examination is to take place, designate a suitable number of persons, either in or not in the official service of the municipality, to be examiners. Such examiners shall conduct such examinations as the commission may direct, and shall make return or report thereof to the commission. If such examiners as are appointed are in the official service of the municipality, such examiners shall not receive extra compensation for conducting such examinations. The commission may at any time substitute any other person, whether or not in such service, in the place of any one so selected as an examiner. The commission members may themselves at

any time act as such examiners, and without appointing examiners. The examiners at any examination shall not all be members of the same political party.

In municipalities of 500,000 or more population, no person who has attained his 35th birthday shall be eligible to take an examination for a position as a fireman or a policeman unless such person has had previous employment status as a policeman or fireman in the regularly constituted police or fire department of such municipality.

In municipalities of more than 5,000 but not exceeding 200,000 inhabitants, no person who has attained his 35th birthday shall be eligible to take an examination for a position as a fireman or a policeman unless such person has had previous employment status as a policeman or fireman in the regularly constituted police or fire department of such city.

In all municipalities, applicants who are 20 years of age and who have successfully completed 2 years of law enforcement studies at an accredited college or university may be considered for appointment to active duty with the police department. Any such applicant who is appointed to active duty shall not have power of arrest, nor shall he be permitted to carry firearms, until he reaches 21 years of age.

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§ 10-1-13. Promotions—Basis

The commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination and the results thereof and the promotional eligible registers prepared therefrom shall be published by the commission within 60 days after any examinations are held. If two or more

applicants achieve the identical final grade average, they shall be placed on the promotional eligible register in their order of seniority in the position from which they seek promotion. The commission shall submit to the appointing power the names of not more than 3 applicants for each promotion having the highest rating, but in making his selection the appointing authority shall not pass over the person having the highest rating on the original register more than once and shall not pass over the person having the second highest rating in the original register more than twice. The commission may strike off all names of applicants from a promotional eligible register after they have remained thereon more than 2 years, provided that the commission shall notify the appointing power before the names are stricken and such appointing power shall fill any existing vacancies before all names are stricken from the promotional eligible register. The method of examination and the rules governing the same, and the method of certifying, shall be the same as provided for applicants for original appointment.

This amendatory Act of 1971 does not apply to any municipality which is a home rule unit.

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§ 10-1-18.1 Police removals or suspensions—Cities over 500,000—Notice—Hearings—Determinations

It any municipality of more than 500,000 population, no officer or employee of the police department in the classified civil service of the municipality whose appointment has become complete may be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board. Before any such officer or employee may be interrogated or examined by or before any disciplinary board, or departmental agent or investigator, the results of which hearing, interrogation or examination may be the basis

for filing charges seeking his removal or discharge, he must be advised in writing as to what specific improper or illegal act he is alleged to have committed; he must be advised in writing that his admissions made in the course of the hearing, interrogation or examination may be used as the basis for charges seeking his removal or discharge; and he must be advised in writing that he has the right to counsel of his own choosing present to advise him at any hearing, interrogation or examination; and a complete record of any hearing, interrogation or examination shall be made and a complete transcript thereof made available to such officer or employee without charge and without delay.

Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held.

The Police Board shall establish rules of procedure not inconsistent with this Section respecting notice of charges and the conduct of the hearings before the Police Board, or before any member thereof appointed by the Police Board to hear the charges. The Police Board, or any member thereof, is not bound by formal or technical rules of evidence, but hearsay evidence is inadmissible. The person against whom charges have been filed may appear before the Police Board or any member thereof, as the case may be, with counsel of his own choice and defend himself; shall have the right to be confronted by his accusers; may cross-examine any witness giving evidence against him; and may by counsel present witnesses and evidence in his own behalf.

The Police Board or any member thereof designated by it, may administer oaths and secure by its subpoena both the attendance and testimony of witnesses and the production of relevant books and papers. All proceedings before the Police Board or member thereof shall be recorded. No continuance may be granted after a hearing has begun unless all parties to the hearing agree thereto. The findings and decision of the Police

Board, when approved by the Board, shall be certified to the superintendent and shall forthwith be enforced by the superintendent.

A majority of the members of the Police Board must concur in the entry of any disciplinary recommendation or action.

Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days.

APPENDIX D

CITY OF CHICAGO ORDINANCE ESTABLISHING EXECUTIVE DEPARTMENT OF PERSONNEL, SEC. 25.1-5.

1) For the preparation, maintenance and revision of a position classification plan for all positions in the career service, based upon similarity of duties performed and responsibilities assigned, so that the same qualifications may reasonably be required for and the same schedule of pay may equitably be applied to all positions in the same class.

* * * *

3) For the recruitment and selection of persons in the city career service on the basis of their relative fitness.

4) For the establishment of eligible lists for appointment and promotion, upon which lists shall be placed the names of successful candidates in order of their relative excellence in the respective examinations. The Director may substitute rankings such as excellent, well-qualified and qualified for numerical ratings and establish eligible lists accordingly. Such rules may provide for lists by area or location, by department or other agency, for removal of those not available for or refusing employment, for minimum and maximum duration of such lists, and for such other provisions as may be necessary to provide rapid and satisfactory service to the operating agencies. The rules may authorize removal of eligibles from lists if those eligibles fail to furnish evidence of availability upon forms sent to them by the Director.

5) For the certification to an appointing authority of the names (a) of the five highest persons available on the appropriate eligible list to fill each vacancy, or (b) from the highest ranking group if the list is by rankings instead of numerical ratings.

6) For promotions which shall give appropriate considerations to the applicant's qualifications, record of performance and ability.

* * * *

9) For keeping records of performance of all employees in the career service, which performance records shall be considered in determining salary increments or increases for meritorious services; as a factor in promotions; as a factor in reinstatements; and as a factor in discharges and transfers.

10) For lay-offs by reason of lack of funds or work, or abolition of a position, or material change in duties or organization, and for reemployment of employees so laid off.

11) For establishment of a plan for resolving employee grievances and complaints.

12) For the establishment of disciplinary measures such as suspension, demotion in rank or grade, or discharge. Such measures shall provide for presentation of charges, hearing rights, and appeals for all permanent employees in the career service, consistent with the requirements of due process in law.

* * * *

14) For such other policies and administrative regulations, not inconsistent with this law as may be proper and necessary for its enforcement.

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25.1-13. This ordinance shall not apply nor have any effect upon the Police Board, its manner of selection, composition, or its powers and duties as set forth in Section 11-2 and Section 11-3 of this Code and Section 3-7-3.1, Section 10-1-18.1, and Section 10-1-45 of the Illinois Municipal Code. Nor shall this ordinance have any effect upon the selection, powers and duties of the Superintendent of Police as set forth in the Municipal Code of the City of Chicago and Section 3-7-3.2 of the Illinois Municipal Code.
